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OFFICE OF PETITIONS

In re Application of :  
Victor B. Lortz :  
Application No. 09/208,064 :  
Filed: December 9, 1998 :  
Attorney Docket No. 2207-6018 :

ON PETITION

This is a decision on the petition under 37 CFR 1.137(b), filed August 24, 2004, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D). The instant petition lacks item (3) above.

This application became abandoned for failure to timely reply to the non-final Office action mailed January 4, 2001, which set a three month shortened statutory period for reply. No extensions of time having been obtained pursuant to the provisions of 37 CFR 1.136(a), the date of abandonment of this application is April 5, 2001. A Notice of Abandonment was mailed on December 18, 2001.

Petitioner states that failure to timely reply was due to non-receipt of the January 4, 2001 Office action, as well as the Notice of Abandonment. As this application has been abandoned for an

inordinate period of time, the statement of unintentional delay must track the language set forth in 37 CFR 1.137(b)(3); i.e., **"the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional."**

Further, as this application became abandoned for failure to reply to a non-final Office action, the filing of a request for continued examination (RCE) under 37 CFR 1.114 was improper, as such a request can only be filed where prosecution has been closed. Accordingly, the RCE will not be processed and the fee submitted therefor will be credited to petitioner's deposit account in due course.

Additionally, extensions of time under 37 CFR 1.136 are available only if asked for "prior to or with the response." In no case, however, may an applicant respond later than the maximum time period set by statute. Accordingly, if the question of abandonment arises when the provisions of 37 CFR 1.136 can no longer be used, then the application is abandoned when the unextended time for response expired. Therefore, no extension fees are due on a petition for revival. In view thereof, the extension of time fee submitted with the petition is unnecessary and will be refunded to petitioner's deposit account as authorized.

Further correspondence with respect to this matter should be addressed as follows:

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Any questions concerning this matter may be directed to the undersigned at (571) 272-3218.



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for Patent Examination Policy